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No. 94-73

In the Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF AMICI CURIAE, PACIFIC BELL, NEVADA BELL, BELLSOUTH CORPORATION, AND GTE SERVICE CORPORATION AND ITS AFFILIATED DOMESTIC TELEPHONE OPERATING COMPANIES, IN SUPPORT OF THE POSITION OF PETITIONER

KEVIN M. FONG
Counsel of Record
PILLSBURY MADISON & SUTRO
225 Bush Street
Post Office Box 7880
San Francisco, CA 94120-7880
Telephone: (415) 983-1270

Attorneys for Amici Curiae

[Additional counsel listed on signature page]

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Pacific Bell, Nevada Bell, BellSouth Corporation, and GTE Service Corporation (and its affiliated domestic telephone operating companies) respectfully submit this brief as amici curiae in support of petitioner Southwestern Bell Telephone Company. Letters from

counsel for the parties, consenting to the filing of this brief, have been filed with this Court.

INTEREST OF AMICI CURIAE

Amici curiae are public utilities that are subject to ratemaking proceedings in the States in which they operate, or are parents or affiliates of such public utilities. The issue presented in this case--whether States may deny all procedural due process protection in ratemaking proceedings--is critically important to all public utilities in every State, including amici curiae.

Pacific Bell is a public utility that provides telecommunications services in California. In addition to providing basic telephone services, Pacific Bell provides a broad range of communications services, and has announced plans for $16 billion in investments to develop a communications "superhighway" in California. Pacific Bell's rates are subject to ratemaking proceedings before the California Public Utilities Commission.

Nevada Bell is a public utility that provides a broad range of communications services, including basic telephone services, in Nevada. Nevada Bell's rates are subject to ratemaking proceedings before the Public Service Commission of Nevada.

BellSouth Corporation is principally engaged in the business of providing telecommunications services and products to the public. BellSouth Telecommunications, Inc., its subsidiary, provides telecommunications services, including local telephone services, in Alabama, Kentucky, Louisiana, Mississippi, Tennessee, North Carolina, South Carolina, Georgia and Florida. BellSouth Telecommunications' rates are subject to ratemaking proceedings in each of those States.

GTE Service Corporation is a subsidiary of GTE Corporation, which is engaged in a variety of telecommunications businesses, including the provision of exchange telecommunications and exchange access services by the GTE Telephone Operating Companies.[1] The GTE Telephone Operating Companies serve customers in 29 States; the rates of the GTE Telephone Operating Companies are subject to ratemaking proceedings in each of those States.

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1 Those companies include: GTE California Incorporated; GTE Florida Incorporated; GTE Hawaiian Telephone Company Incorporated; GTE North Incorporated; GTE Northwest Incorporated; GTE South Incorporated; GTE Southwest Incorporated; Contel of California, Inc.; Contel of Kentucky, Inc., d/b/a GTE Kentucky; Contel of Minnesota, Inc., d/b/a GTE Minnesota; Contel of North Carolina, Inc., d/b/a GTE North Carolina; Contel of South Carolina, Inc., d/b/a GTE South Carolina; Contel of Texas, Inc., d/b/a GTE Texas; Contel of the South, Inc., d/b/a GTE Systems of the South; Contel of the West, Inc., d/b/a GTE West; and Contel of Virginia, Inc., d/b/a GTE Virginia.

ARGUMENT

The issue presented in this case--whether States may deny all procedural due process protection in ratemaking proceedings--is critically important to public utilities throughout the country. A State ratemaking proceeding can involve literally billions of dollars; each year, States conduct hundreds of these proceedings, directly impacting public utilities and the lives of their employees, investors and customers. The fundamental question of whether due process is required in such proceedings affects virtually every aspect of ratemaking proceedings including, as in this case, the basic right to an unbiased decisionmaker.

This Court should address this important issue and give the States, and the public utilities they regulate, much-needed guidance on the due process protection required in ratemaking proceedings. The confusion on this issue in the state courts has been widespread. The state courts have reached a wide variety of conclusions in addressing the application of due process in ratemaking proceedings:

- Several courts have squarely held that due process applies in ratemaking proceedings, and requires an impartial decisionmaker. New England Tel. & Tel. Co. v. Public Util., 448 A.2d 272, 280 (Me. 1982) (due

process requires that ratemaking hearings be conducted in an impartial manner); Michigan Intra-State Motor v. PSC, 504 N.W.2d 677, 682 (Mich. App. 1993) (common carrier in ratemaking proceeding was entitled to an impartial decisionmaker); Business & Professional People v. Barnich, 614 N.E.2d 341, 345 (Ill. App. 1993) (judicial conduct principles requiring impartiality apply to commissioners in a ratemaking proceeding).

- The California Supreme Court reviewed this Court's opinions setting forth the constitutional standards for rate proceedings, and concluded that this Court "has long made it clear that within the regulatory context due process is a flexible concept." City of Los Angeles v. Public Utilities Com., 15 Cal. 3d 680, 698 (1975). At a minimum, due process in ratemaking proceedings requires a fair hearing: "Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped." City of Los Angeles, 15 Cal. 3d at 698 (emphasis added);

quoting Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942).[2]

- As noted by Petitioner, a number of state courts addressing due process issues have recited the adage that "ratemaking is legislative," even though this Court's due process precedents have held that principles of due process do apply to ratemaking proceedings. See Petition for Writ of Certiorari, p. 16, n.4.

In addition, numerous state courts have not yet addressed whether due process is required in ratemaking proceedings. If left unreviewed, the Oklahoma Supreme Court decision could mislead those courts to believe that States may deny all procedural due process protection in ratemaking proceedings.

Thus, it is apparent that there is an immediate need for this Court to address the issue presented. While it should be clear from this Court's precedents that principles of due process apply to ratemaking proceedings, it is undeniable that there has been confusion among the state courts, despite these precedents. See West Ohio Gas Co. v. Public Utilities Comm'n of Ohio, 294 U.S. 63, 70 (1935);

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2 However, the California Supreme Court has not specifically addressed the due process requirements for recusal of a biased decisionmaker in a ratemaking proceeding.

West Ohio Gas Co. v. Public Utilities Comm'n of Ohio, 294 U.S. 79, 82 (1935). In light of the importance of the issue and the disagreement among the state courts on the constitutional issue involved, this case warrants a grant of certiorari. See Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 753 n.1 (1985).

The question of whether States may deny all procedural due process in ratemaking proceedings is squarely and dramatically presented in this case. "[A] 'fair trial in a fair tribunal is a basic requirement of due process.'" Withrow v. Larkin, 421 U.S. 35, 46 (1975). If a State can deny a utility the right to an unbiased decisionmaker in a ratemaking proceeding, then States could attempt to conduct ratemaking proceedings without affording utilities any due process protection whatsoever. This Court should make clear that the Constitution does not allow such a result.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Dated: August 15, 1994.

Respectfully submitted,

KEVIN M. FONG
Counsel of Record
PILLSBURY MADISON & SUTRO
225 Bush Street
Post Office Box 7880
San Francisco, CA 94120-7880
Telephone: (415) 983-1270

Attorneys for Amici Curiae

Of Counsel
for Pacific Bell:

RICHARD W. ODGERS
MARGARET deB. BROWN
130 Kearny Street
San Francisco, CA 94108
Telephone: (415) 394-2700

JAMES S. HAMASAKI
140 New Montgomery Street
San Francisco, CA 94105
Telephone: (415) 542-7575

Of Counsel
for Nevada Bell:

MARGARET E. GARBER
Room B 136
645 East Plumb Lane
Reno, NV 89502
Telephone: (702) 333-3138

Of Counsel
for BellSouth Corporation:

WALTER H. ALFORD
JOHN F. BEASLEY
WILLIAM B. BARFIELD
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610
Telephone: (404) 249-2641

Of Counsel for GTE Service
Corporation and Its Affiliated
Domestic Telephone Operating
Companies:

THOMAS R. PARKER
600 Hidden Ridge
P. O. Box 152092
Irving, TX 75015-2902
Telephone: (214) 718-6361